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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 372

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

—against—

FINN'S LIQUOR SHOP, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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The petition should be denied because it does not establish that there is a Federal question of substance involved, or that the decision of the court below is not in accord with the decisions of this Court.

Statement of the Case

The facts are concisely stated in the opinion of the Court below (Pet. 11A-13A). Respondent had been licensed for several years by Petitioner to sell alcoholic beverages at retail for off-premise consumption, as distinguished from the sale of such beverages by hotels, restaurants and bars for on-premise consumption (Pet. 13A, see note 3). Having

been informed that evidence of sales on credit by Respondent, in violation of law, was in a coat in the rear of Respondent's store, Petitioner sent two investigators to the premises on January 11, 1967 to obtain the evidence. After the store manager, in answer to their request to inspect the premises, told them to "Go ahead" one of them went to the non-public part in the rear of the premises, searched a coat hanging there, and took therefrom sales slips indicating sales on credit.

Upon these facts, the Court below found that the search was unconstitutional, that it was not an inspection (Pet. 14A, note 4), that the claimed statutory power to inspect, even if applicable here, was so broad that it was unconstitutional, and that evidence obtained by means of an illegal search was excludable in an administrative hearing as much as in a criminal trial. It excluded the evidence and affirmed the reversal of Petitioner's determination which was based on such evidence.

Questions Presented

Petitioner posits the questions in its petition on an assumption of fact contrary to the findings of the Court below and on a statement of law concerning the legal determination made below which does not represent the holding of the Court below. The fact is that this case does not involve a regulatory inspection of a licensed business to acquire information of non-compliance with law, as repeatedly alleged in the petition; but involves a warrantless search of a coat hanging in the non-public part of respondent's business, made as the result of prior information given to petitioner that evidence would be found in the coat

showing sales on credit in violation of law (Pet. 3A-5A, 11A).

The Court below did not hold that *Mapp* v. *Ohio* (1961), 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, mandated or compelled the legal conclusions reached, as alleged in the petition, but the Court only applied the principles enunciated in *Mapp,* and other cases decided by this Court, to the facts herein, in order to make the determination stated in the last paragraph of its opinion. The Court said (Pet. 19A):

> "In sum, in each of these three cases, the evidence relied upon to support the Authority's determination was found to have been obtained in violation of the petitioner's Fourth Amendment rights. The logic of the *Mapp* rule, which requires the exclusion of such evidence in order to deter State officials from engaging in unlawful searches and seizures applies whether the evidence is sought to be used in a criminal trial or on an administrative hearing. There can be no justification for any State agency, charged with enforcement of the law, to rely, in fulfilling its function, upon the unlawful and unconstitutional acts of its agents."

Analysis of Petitioner's arguments (Pet. 6-11) indicates that it claims that the Twenty-first Amendment to the United States Constitution grants the State authority to regulate the sale of alcoholic beverages; that such regulatory function requires the State to make warrantless inspections; that any evidence obtained as the result thereof should not be excluded for any reason in administrative hearings because the strictures imposed by the cases interpreting the Fourth Amendment apply only to criminal cases; that the standards developed in criminal cases to determine the lawfulness of a search and seizure should not be applied in administrative proceedings.

These arguments raise no Federal question of substance and do not show that the determination of the Court below was not in accord with the decisions of this Court.

The Writ Should Be Denied

1. In *See* v. *City of Seattle* (1967), 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943, this Court followed its previous decisions (see, *supra*, 387 U.S. 543, 87 S. Ct. 1739, 18 L. Ed. 2d 946) holding that the protection of the Fourth Amendment against unreasonable searches and seizures applied to commercial as well as residential premises. This Court then held that warrantless code enforcement inspections of commercial premises were barred by the Fourth Amendment in accordance with its determination made the same day for residential premises; citing *Camara* v. *Municipal Court* (1967), 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930. *Camara* and *See* established that administrative entry to either non-public commercial or residential premises could be compelled only by warrant. Both cases involved criminal trials for refusal to permit regulatory inspection by administrative agencies granted broad authority to do so by statute, but the discussion of the protection of the Fourth Amendment in no way indicated a limitation of such protection only to criminal proceedings.

The Court of Appeals below applied the principles enunciated in *See* to the facts it found herein and decided that the investigator's search of the coat hanging in the non-public portion of the respondent's business, made without a warrant, was illegal. It said (Pet. 14A):

> "Although the court did indicate that the Constitution might not inhibit certain narrowly defined inspection

> procedures, the implication of the decision in the *See* case is clear. No State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not constitutionally be justified."

The finding of the Court below that the warrantless search was unlawful cannot be challenged and is in accord with the decisions of this Court. *Camara, supra,* 387 U.S. 528, 87 S. Ct. 1730, 18 L. Ed. 2d 935. Petitioner does not dispute this but argues that the determination that evidence found in an unlawful search is excludable in an administrative hearing results in the "outlawing of all warrantless inspections."

2. The determination of the Court below that the Fourth Amendment barred the use in an administrative proceeding of evidence secured in an unlawful search is not contrary to but is in accord with the latest decisions of this Court. *One 1958 Plymouth Sedan* v. *Pennsylvania* (1965), 380 U.S. 693, 696-698; 85 S. Ct. 1246, 1248-9; 14 L. Ed. 2d 170, 172-3; *Boyd* v. *United States,* 116 U.S. 616, 6 S. Ct. 524; 29 L. Ed. 746; *See* v. *City of Seattle, supra,* 387 U.S. 543-545, 87 S. Ct. 1739-40, 18 L. Ed. 2d 946-7. *Boyd* and *Plymouth Sedan* were forfeiture cases, i.e., civil proceedings which held that the Fourth Amendment exclusionary rules applied to such cases. *See,* albeit a criminal case, was based on and stressed the Fourth Amendment application to administrative agency subpoenas, not involved in criminal trials.

3. Since the determination below is in accord with the decisions of this Court with respect to the unlawfulness of the search and the exclusion of the evidence obtained thereby, is there any Federal question of substance? Respondent submits there is none.

Petitioner argues as if the Court below had decided that *Mapp* v. *Ohio, supra*, mandated the exclusion of the evidence involved herein. Petitioner however misreads the Court's opinion (Pet. 8A). Though the Court below speaks of the "exclusionary rule of *Mapp* v. *Ohio*", *Mapp* only decided that the protection of the Fourth Amendment was expanded by the Fourteenth Amendment to apply to the States. Thus all Federal law interpreting the Fourth Amendment became part of the State law. *Mapp* mandated only that the exclusionary rules of the Federal law must be applied by the States.

Neither *Mapp* nor any other Federal case prohibited the Court below from extending the exclusionary rules to administrative bodies in the State. In doing so it was free to utilize logic and reasoning from Federal decisions, which it did, to achieve the result reached. That however does not create a Federal question of substance, nor has Petitioner indicated what Federal question arises from the circumstances herein.

Primarily, Petitioner seeks review because of its belief that this case will prevent State agencies from making warrantless inspections, because any evidence found thereby will be excluded, thus rendering the inspection useless. This is not a Federal question, however, but one for the State to solve by providing search warrants or inspections with proper limits within the Fourth Amendment. Petitioner insists, quite indefensibly, that its conduct herein was an

inspection when both Courts below and the administrative hearing officer thought otherwise (Pet. 4A, 14A, note 4). It is therefore obvious that the decision below does not prevent warrantless inspections but only searches and unlimited inspections without any protection whatsoever from arbitrary behaviour of governmental agencies.

Thus Petitioner seeks to uphold its action on the basis that it had statutory authority to make a broad and unlimited inspection, which is not the warrantless inspection mentioned in *See, supra,* 387 U.S. 544, 545, 87 S. Ct. 1740, 18 L. Ed. 2d 947, and was distinguished in *Colonnade Catering Corp.* v. *United States,* 410 F. 2d 197, 2d (2 CCA–1969) which cited one of the decisions herein (Pet. 1A) as an example.

In summary, this case did not involve a challenge to a regulatory normal inspection but to a warrantless search of a coat in non-public premises. The Court below held that the search was unlawful, and the evidence seized excludable. To do so, it extended the exclusionary rules developed under the Fourth Amendment to administrative hearings, not because *Mapp* mandated it, but because the Court, by applying the logic and reason of Federal and other cases could see no sound reason for refusing to do so.

CONCLUSION

The extension of the exclusionary rules of the Fourth Amendment to cover State administrative hearings raises no Federal question, nor is such a determination contrary to the decisions of this Court. The Writ should be denied.

Respectfully submitted,

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